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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1911.

No. 11.

AUGUSTO BURNET,

APELLANT,

vs.

JOSEFA AND ISABEL DESMORNES ALVAREZ.

APPELLANT'S BRIEF.

WILLIS SWEET,
Attorney for Appellant

SUPREME COURT OF THE UNITED STATES

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NO. 133.

AUGUSTO BURNET,

APELLANT,

vs.

JOSEFA AND ISABEL DESMORNES ALVAREZ.

APPELLANT'S BRIEF.

STATEMENT.

The appellees brought an action in the district court of Porto Rico for the district of Humacao, the said action being designated in the law as an action for recognition of affiliation. They claimed to have been the illegitimate, but recognized children of Adolfo Desmornes, and the action was brought for the purpose of obtaining a judicial declaration of said recognition, the purpose having been to acquire the rights and interests in the estate of the deceased Adolfo Desmornes given by law to recognized illegitimate children.

In accordance with the law in the premises, the appellees

gave notice by publication to the unknown heirs of Adolfo Desmornes of the nature of the claim presented, and said notice advised said unknown heirs, if any there should be, of their right to appear within sixty days from the date of said publication and in whatever manner might be proper, to contest the claim of the appellees, as well as urge their own. (R. p. 21, in opinion of the court.)

Accordingly, the appellant appeared and answered said petition, and as the nephew of the deceased, denied the claims of appellees, claimed to be his only heir, asked to be declared such, and for a decree declaring him entitled to inherit all of the estate of the said Adolfo Desmornes, deceased. (R. p. p. 25-26.)

After the evidence, documentary and oral, had been submitted in behalf of plaintiffs, the court held that their right of action had prescribed by statute, and holding further that the statute was jurisdictional in its character, ordered that "judgment be entered in favor of defendant(s)". (R. p. 22.)

The plaintiffs appealed to the Supreme Court of Porto Rico. The Supreme Court reversed the district court and ordered that judgment be entered for plaintiffs.

The decision of the Supreme Court was based upon the theory that the statute in question (hereinafter set forth) was a privilege that might have been invoked by the defendants, either by demurrer or answer, but that not having been presented in any form, the defendants were deemed to have waived it. (R. p. p. 62-63.) Thereupon the Supreme Court, on the evidence submitted by plaintiffs, ordered that the judgment of the district court be reversed, and judgment entered for plaintiffs. The value of the estate in controversy, (probably assessed value) was $7.745. (R. p. 26.)

ASSIGNMENTS OF ERROR

As the assignments of error relied upon are very brief, we will set them forth at this place:

I.

The court erred in holding that the statute involved is a statute of limitations and not jurisdictional in its character.

II.

The court erred in holding that the trial court was without authority to dismiss the action of plaintiffs of its own motion, for the reason that said statute, being jurisdictional in its character, the court was authorized to refuse to consider said cause after its lack of jurisdiction became apparent.

III.

The court erred in directing the district court to enter a judgment against appellant.

IV.

The court erred in reversing the judgment of the district court and in ordering said district court to enter a judgment for appellees.

I.

THE LAW OF THE CASE.

The statute in question is explicit in its terms, and while more liberal than the former law on the subject, is nevertheless clear in its requirement that the action must be filed within two years after the claimant becomes of age.

The statute under which the action was brought is as follows:

"**Section** 198. (Civil Code of Porto Rico.) The filiation of children shall be proved by the certificate of the birth

issued by the civil registry, by the possession of the status of filiation, or by any other legal means."

"**Sec.** 199. An action to claim filiation may be filed at any time within two years after the child becomes of age, and it shall be transmitted to his heirs, if he should die during his minority, or in a state of lunacy. In these cases, an heir shall have five years in which to enter an action."

Such was the statute of Porto Rico, approved March 1, 1902. This was more than three years before the death of Desmornes. Isabela, one of the plaintiffs, was born in November, 1864. (R. p. 17; f. 23), and had therefore been of age for approximately sixteen years when Desmornes died. The record fails to show the date of Josefa's birth, but as appears from the alleged letters written her in 1904, she was then a married woman. (R. p. 17.)

If, then, it was necessary to comply with sections 198 and 199, the plaintiffs failed to bring themselves within the provisions set forth.

The sections quoted deal with the question of filiation, and now we present section 189, Civil Code of Porto Rico, which deals with the question of obligatory recognition. The section is as follows:

"**Section** 189. A father is obliged to recognize his illegitimate child in the following cases:

"(1) When there be an authentic statement in writing made by him expressly recognizing its paternity.

"(2) When publicly or privately he has shown that it is his child, or has called it as such in conversation, or looks after its education and maintainance.

"(3) When the mother was known to have lived in concubinage with the father during the pregnancy or birth of the child, or when the child was born while his parents were engaged to be married. (Relaciones amorosas.)

II.

These statutes, we beg to submit, are not merely prescriptive; but sections 137, act 1899, and 199, 1902, especially, are jurisdictional, in that they fix the time within which actions are to be commenced.

The Porto Rico statutes on prescription are found under a chapter devoted to that subject, beginning with section 1862, and ending with section 1875, both inclusive. The entire statute is silent as to actions affecting the rights of illegitimate children.

Counsel for appellees, as well as the majority opinion of the Supreme Court, treated Section 199, (anti) as a prescriptive law, and applied the principles of a statute of limitations. But we do not regard the law in question as such a statute. The right of the illegitimate child is treated by court and counsel as a vested right, whereas we present the right of action as a privilege granted to the illgitimate child who acts within the provisions of the law, and who must observe those legal requisites as a condition precedent if the privilege or right granted is to be exercised. At the time this action was brought, the plaintiffs had permitted two years to pass, and also the opportunity offered by the statute of 1899. The act of 1899 is not as liberal as the act of 1902; but that the statutory law invoked by both parties to the controversy may be before the court, in their entirety, we here present the Toro law, accepting the translation found in the record, p. 53.

"And so that there may be no doubt who are natural children, we order and command that said natural children are: those whose fathers at the time of birth or hereafter, could marry their mothers, without dispensation and the father should recognize them as such; in case he is not married, or where it was had with some other woman who is single: When these conditions are attendant upon said child we command that he is a natural child."

Under the Toro law, the action did not prescribe; there was no statute of limitations applicable, unless the general law would apply, and that is not contended for in this case.

Then came the act of 1899, Section 137, Civil Code of Porto Rico, as follows:

Section 137. The actions for the acknowledgment of

natural children can be instituted only during the life of the presumed parents, except in the following cases:

(1) If the father or mother died during the minority of the child, in which case the latter may institute the action before the expiration of the first four years of its majority.

(2) If, after the death of the father or mother, some instrument, before unknown, should be discovered in which the child is expressly acknowledged.

In this case the action must be instituted within six months following the discovery of such instrument."

Thus, in the case at bar, the plaintiffs would have been denied the right of action, because the same was not brought during the lifetime of the presumptive father, none of the exceptions existing in this case.

Then, we have the act of 1902 (supra) which permits the action within two years after the claimant becomes of age, whether the presumptive parent be dead or alive; or three acts:

(1) The Toro law, no time or limitation.

(2) The act of 1899, limiting the action to the life-time of the presumptive parent; with exceptions not applicable in this case; and,

(3) The act of 1902, requiring that the action be brought within two years after the child becomes of age, and with no other condition, save the exceptions which are not present in the case at bar; and regardless of whether the presumptive parent be dead or alive.

We submit that the last act, the act of 1902, was in force at the time this action was brought, and that it was a much needed, as well as a just and sensible law.

III.

The decision in the case at bar has in principle been several times reversed by the Supreme Court of Porto Rico, and the contention of the appellant sustained.

Josefa Desmornes did not appear as a witness; but Isabel testified (R. p. 16), "that she has no instrument of recog-

nition", etc, and therefore she resorts to different classes of testimony, which, under the law already cited (statutes, supra) she had a right to do. So that, as to this phase of the case, the only question remaining is the effect of the statute limiting the time in which the action may be brought.

Under the Toro law, the action for recognition did not prescribe, unless the general statute should be held to apply. But when the Spanish Civil Code, applicable in Porto Rico in 1899, repealed the Toro Law, Isabel was thirty five years of age. Until the death of Desmornes—the presumptive father—in November, 1905, (R. p. 21, f. 28) this action might have been brought during the life-time of Desmornes, giving the statutes of 1899 and 1902, a very liberal construction. At this time Isabel was at least thirty nine years of age. It is, then, perfectly clear that under the Law Toro, and the decree of 1899, the right of action had lapsed when it was finally brought.

Since the decision in the case at bar was rendered, holding the statute in question to be a statute of limitation merely, and necessary to be pleaded as provided in the code of civil procedure of Porto Rico, (referred to in the opinion of the court, supra) the Supreme Court of Porto Rico has, we respectfully submit, entirely changed its view.

We cite:

Gual et al vs Bonafoux et al
15 Porto Rico, (English) 542.

In this opinion, the court does not deal directly with the question at bar, but moves with caution in the direction of the view subsequently expressed, and herein urged.

Armsterdam et al vs Puente,
16 Porto Rico (English), p. 527.

The view contended for by appellant is more vigorously asserted in the case last above cited.

This principle is re-affirmed in:

Puente vs Puente,
16 Porto Rico (English), p. 556.

In Calaf vs Calaf, the Supreme Court of Porto Rico was emphatic in its enunciation of the principle herein contended for.

(This decision will appear in vol. 17, P. R. reports, and, we are advised, will be in the possession of this Honorable Court before this case is considered. In any event, the cause of Calaf vs Calaf is before this court on appeal, and the decision is of course in the record.)

In the decision last referred to, the Supreme Court of Porto Rico, quoting from a decision of the Supreme Court of Spain, giving the substance of the decision, says:

"The last decision quoted above clearly states that it **is true** that in the action the statute of limitations was not alleged as a bar, nor any citation made on the appeal of any section of the code relative to duration of actions other than Section 127 which is not **applicable**, and the said Supreme Court of Spain, in a decision rendered on the 19th day of December, 1902, notwithstanding the fact that it was on a question of recognition of a natural daughter born while the Toro Law was in force, affirms that it is not true that the said section 137 of the Spanish Civil Code does not provide a term for the exercise of the action on recognition, as it expressly provides four years immediately succeeding the date upon which the interested party becomes of lawful age."

Quoting further from the same opinion, the Court said:

"The action on recognition of Juan Ramon Calaf has been **extinguished by limitation**, whether under section 137 of the Spanish Civil Code, (1899) or section 199 of the Revised Code." (both supra.)

This is precisely our contention. The right of action was "extinguished". And this was true as to Isabel, under the Toro Law as well as under the Royal Decree of 1899, and the statute of 1902; for when this action was brought, more than twenty-one years had elapsed since she became of age, and the right of action had lapsed.

We do not find in the record any evidence as to the age of Josefa, except the statement made by the district court in its opinion, as follows:

"The death of Adolfo Desmornes, presumptive father of the plaintiffs ocurred in the month of November 1905, prior to the commencement of this action, and as the proofs show that plaintiffs reached their majority more than two years before the present code took effect, the action has prescribed by both laws."

Under these facts, if the time fixed was reasonable, it was impossible for the plaintiffs to maintain this action after the death of their presumptive father, or subsequent to March, 1902, when the present code became the law:

In Puente vs Puente, (supra), the Supreme Court of Porto Rico holds that the two year statute is reasonable, and as to the doctrine itself the court quotes this Honorable Court in Calaf vs Calaf as follows:

"it has been held by the Supreme Court of the United States": "This court has often decided that Statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes affect. Hawkins vs Barney, 5 Pet. 451; Jackson vs Lamphire, 3 id. 280; Sohn vs Waterson, 17 Wall. 596; Christmass vs Russell, 5 id 290; Sturgis vs Crowninshield, 4 Wheat. 122. It is diffieutt to see why, if the Legislature may prescribe a limitation where none existed before, it may not change one which has already been established. Terry vs Anderson, 95 U. S. 832."

Prescriptive Statutes.—In this case the action is barred. —Comparison.—Remedy.

It appears to us that there is a clearly defined difference between the statutes in question, and the different state statutes of limitations. In the broad sense of the word, both classes are statutes of limitation; but one class is jurisdictional, and intented as such, while the other is a privilege, and is so stated. If a statute declares that after a note has been due for more than five years, and none of the requirements for the renewal of its life have been observed, the maker may plead the statute in bar, the plea is simply a privilege that has been established as a matter of public policy,

but the action has not been barred; the law does not declare the note to have been paid; the courts do not look with favor upon such statutes or such pleas, except in aggravated cases, while a man ruins his own credit by pleading this statute, if it be apparent that the plea is made to avoid an honest debt. Hence, the statute is little abused.

The statute under consideration is prescriptive, and it is more; it is prohibitive. It was, like the statute of limitations, enacted from the standpoint of public policy, but there the comparison ceases. The one gives to the defendant the privilege of pleading a bar to the claim or debt, but always leaves the issue open to controversy; the other bars the action itself; is a condition precedent to the invoking of the remedy. This, we believe, as shown herein, has become the settled doctrine of the Spanish and Porto Rican courts in the interpretation of those statutes.

And this suggests one more thought: The statute is remedial in character, and intended to give the illegitimate child a remedy, but in thus "tempering the wind to the shorn lamb", it was found necessary to combine with this remedy reasonable protection to property rights, with due regard for the interests of legitimate children. The case at bar is a powerful illustration of the necessity of the statute limiting the right of action. The only claimant appearing as a witness in this case was Isabel, (R. p. 16) and she had been of age for more than twenty years. On the night of her alleged father's death, she found the letters addressed to herself in the bottom of his trunk! Then, having allowed the Law Toro and the Royal Decree of 1899 to lapse, she brings her action.

A remedial statute controls and directs the manner and method of the remedy, but does not affect the right. But a remedial statute may be changed or modified at any time, and the procedure goes with it. This principle has, we think, been sufficiently set forth in the opinions cited herein construing this law, but in addition, we present the following:

Pretchard vs Norton, 106 U. S., 124-130.

Bank vs Donnelly, 8 Peters, 361.

Civil Code of Porto Rico, Section 1840, as follows:

"Prescription, which began to run before the publication of this code, shall be governed by the prior laws but if, after this Code became operative, all the time required in the same for prescription has elapsed, it shall be effectual, even if according to said prior laws a longer period of time may be required."

IV.

The Court erred as set forth in the fourth assignment of error, to-wit, in ordering judgment for the appellees.

The opinion of the district court, (R. p. 21) ordered "that judgment be entered in favor of the defendants". But the said court, in rendering judgment, did nothing more than "dismiss the complaint", etc. Nothing was given to the claimant Burnet. (R. p. 30-31.) This may have been for the reason that appellant had not proved his allegations of heirship set forth in his answer, or claim, and that this fact was overlooked when the opinion (R. p. 21) was written. Evidently, the district court, satisfied that the action, or right of action, had been extinguished, dismissed the cause without considering the rights of appellant, or calling upon him to sustain his denial of the recognition of appellees, (R. p. 26, f. 34), or to establish his own claim. If this deduction from the record is correct, it appears to us that the court erred in ordering the district court to enter judgment for the appellees as it is apparent that the appellant had not been heard at all.

The dissenting opinion not having been filed at the time the record was sent up, we direct attention to the fact that it will be found published with the case:

P. R. Rep., Vol. 13 (English) p. 28-29.

We respectfully submit that the dissenting opinion is in full accord with the views of the entire court as expres-

sed in later interpretations of the statute. The following paragraphs are from the dissenting opinion:

"I dissent because the necessity in this case for bringing an action within the time limited by Sec. 199 of the Civil Code was a condition precedent to the attainment of any right by the complainants, and being such a condition precedent, that the running of the statute of prescription could not be interrupted."

"In this case, moreover, the battle in the lower court was waged over the question of prescription. That court found that the action had prescribed, and even if the statute was capable of interruption or being waived, some regard was due to its action in the premises. The majority opinion is based upon the fact that there was no plea of prescription, and while this was true, when the case was sent back, the lower court should have been left free to permit amendments in order to raise the question really decided by it.

I am authorized to say that Mr. Justice MacLeary concurs in this dissent."

The above conclusion we believe to be important. Even while we do not believe that appellees could lawfully maintain an action after the approval of the act of March 1, 1902, yet, if it should be held that we are wrong in this contention, then the witnesses should have been subjected to cross-examination, or at least the privilege should have been extended. This is especially true under the extraordinary statements contained in the testimony of witness Isabel Desmornes. (R. p. 12.)

Mollan vs Torrance 9 wheat. 538.

Garland vs Davis, 4 How. 132.

We believe the Supreme Court of Porto Rico was in error as herein set forth, and that the cause should be sent back to the district court of Humacao, and the claimant Burnet permitted to prove his right to inherit the property in question.

Respectfully submitted,

Willis Sweet.

Attorney for Appellant.